Supreme Court, U.S.
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No. 97-1651

In The

Supreme Court of the United States

October Term, 1997

MESCAL BLANCHARD BROWN,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana State Supreme Court

BRIEF IN OPPOSITION

MICHAEL J. O'REILLY
Counsel of Record
FORD MOTOR COMPANY
1500 Parklane Towers West
Dearborn, Michigan 48126
(313) 845-5263

ROBERT W. MAXWELL
JULIANNE T. ECHOLS
PULASKI, GIEGER & LABORDE
Suite 4800 – One Shell Square
New Orleans, Louisiana 70139
(504) 561-0400

Counsel for Ford Motor Company

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant a petition for certiorari to review arguments under the Fifth and Fourteenth Amendment relating to a juror's incorrect answer during *voir dire,* where Petitioner did not assert such arguments in the Louisiana courts.

2. Whether this Court should grant a petition for certiorari where the result would be the same (a motion for new trial based on a juror's inaccurate answer during *voir dire* would be denied) under the authority on which Petitioner relies, *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548 (1984), or under controlling Louisiana authority.

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6

Respondent, Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

The Hertz Corporation

Argentina
Invercred Compania Financiera S.A.

Australia
Ford Motor Company of Australia Limited

Belgium
Ford Motor Company (Belgium) N.V.

Brazil
Autolatina Comercio e Participacoes Financerias Ltd.

Denmark
Ford Motor Company A/S

Finland
Oy Ford Ab

Germany
Ford Werke-Aktiengesellschaft

Holland
Ford Nederland B.V.

Japan
Mazda Motors Corporation

Korea
Ford Motor Company of Korea

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6 – Continued

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

RESPONDENT'S BRIEF IN OPPOSITION 1

OPINION BELOW 1

COUNTERSTATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PURPORTED FIFTH AND FOURTEENTH AMENDMENT ARGUMENTS NOT RAISED IN THE STATE COURT 3

II. THE RESULT WOULD BE THE SAME UNDER THE AUTHORITY ON WHICH PETITIONER RELIES, *McDONOUGH POWER EQUIPMENT, INC. v. GREENWOOD*, 464 U.S. 548 (1984), AS IT WAS UNDER CONTROLLING LOUISIANA AUTHORITY 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Cardinale v. Louisiana, 394 U.S. 437 (1969) 3

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 3

Lee v. K-Mart Corp., 483 So. 2d 609 (La. App. 3d Cir. 1985), *writ denied*, 484 So. 2d 661 (La. 1986) 6

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) 3, 4, 5, 6

Temple v. Liberty Mutual Ins. Co., 330 So. 2d 891 (La. 1976) 7

United States v. Scott, 854 F.2d 697 (5th Cir. 1988) .. 3, 4, 5

Uriegas v. Gainsco, 663 So. 2d 162 (La. App. 3d Cir.), *writ denied*, 664 So. 2d 458 (1995) 5

Vallo v. Gayle Oil Co., 646 So. 2d 859 (La. 1994) 3

White v. Louisiana Western Ry. Co., 140 So. 486 (La. 1932) 4

Vezina v. Theriot Marine Service, Inc., 610 F.2d 251 (5th Cir. 1980) 5, 6

Yee v. City of Escondido, 503 U.S. 519 (1992) 3

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Company (Ford) respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Louisiana Supreme Court's denial of Petitioner's Application for Writs of Certiorari and Review.

OPINION BELOW

The opinion of the Louisiana Court of Appeal for the First Circuit is reported at 700 So. 2d 932 and is reprinted in Petitioner's Appendix at 4. The order of the Louisiana Supreme Court denying Petitioner's Application for Writ of Certiorari and Review is unreported and is reprinted in Petitioner's Appendix at 26.

COUNTERSTATEMENT OF THE CASE

Petitioner was seriously injured when a trailer carrying a pontoon boat became detached from the truck that was towing it, crossed over the center line, and crashed into Petitioner's 1984 Lincoln Town Car. Portions of the pontoon boat intruded into the Lincoln at the driver's window, exactly where Petitioner was seated.

Petitioner sued numerous parties, ultimately settling during trial with all parties other than Ford. At trial against Ford, Petitioner alleged that the Town Car's seat belt was defective in design because it allowed slack to develop in the seat belt, thereby allowing Petitioner to move forward toward the pontoon boat. Ford presented

substantial evidence that the pontoon boat struck Petitioner in her normal seating position before she had time to move forward. The jury found in favor of Ford on all counts.

During jury selection, juror Mark Allement was asked whether he had ever been sued and he answered in the negative. Following trial, an investigator hired by Petitioner's counsel discovered that Mr. Allement had in fact been sued, over four years earlier, in connection with an automobile accident in which he collided with a youth on a bicycle. The suit was handled by Mr. Allement's insurer and was settled by the insurer, without trial, about nine months after it was filed. Mr. Allement's sole involvement in the suit was his appearance for a routine deposition.

Petitioner's assertions concerning Mr. Allement's attitudes and alleged bias are sheer speculation, not supported by anything in the record. The only information established below is that Mr. Allement's statement that he had not been sued was incorrect.

Petitioner moved for a new trial, citing juror misconduct and several other alleged errors. The motion was denied and Petitioner appealed to the Louisiana Court of Appeal. Petitioner did not cite the United States Constitution, and did not cite any federal authority, at either the trial court or the Court of Appeal. The Court of Appeal affirmed. One judge disagreed with the majority's conclusion on juror misconduct, but nevertheless concurred with the majority in the result, on the basis that his independent evaluation of the entire record showed that Petitioner had failed to prove the existence of a defect.

Petitioner then filed an Application For Writs of Certiorari and Review in the Louisiana Supreme Court. Petitioner's Application cited two federal decisions, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988), but did not contain any reference to the Fifth or Fourteenth Amendments. The Louisiana Supreme Court unanimously denied Petitioner's Application without opinion (Justice Lemmon not participating).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PURPORTED FIFTH AND FOURTEENTH AMENDMENT ARGUMENTS NOT RAISED IN THE STATE COURT.

This Court will not decide federal constitutional issues raised here for the first time. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Further, this Court will not review constitutional issues presented to a state Supreme Court for the first time on appeal. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992).

Louisiana courts follow a similar rule. "Issues not submitted to the trial court for decision will generally not be considered by the appellate court on appeal." *Vallo v. Gayle Oil Co.*, 646 So. 2d 859, 863 (La. 1994).

In this case, Petitioner made no reference to any constitutional issue or to any federal authority at either the trial court or the Louisiana Court of Appeal. This alone is fatal to her petition to this Court.

In her Application to the Louisiana Supreme Court, Petitioner for the first time cited two federal decisions, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988), but still did not make any reference to the Fifth or Fourteenth Amendments.

The Louisiana Supreme Court denied Petitioner's Application by simple order, with no indication that any constitutional issues were addressed. Petitioner in some places attempts to gloss over this fact by referring to the "opinion" of the Louisiana Supreme Court, but in other places she acknowledges that "there was no decision on that matter." Petition at 6. In any event, denial of a writ of certiorari does not constitute a decision on the merits. *White v. Louisiana Western Ry. Co.*, 140 So. 486, 488 (La. 1932).

Because Petitioner did not raise any constitutional issue at any level in the state court, and because the state court therefore did not review any constitutional issue, this Court should not consider such issues for the first time here, and the petition for certiorari should be denied.

II. THE RESULT WOULD BE THE SAME UNDER THE AUTHORITY ON WHICH PETITIONER RELIES, *McDONOUGH POWER EQUIPMENT, INC. v. GREENWOOD*, 464 U.S. 548 (1984), AS IT WAS UNDER CONTROLLING LOUISIANA AUTHORITY.

Even if Petitioner had preserved constitutional arguments, and even if it is assumed that those arguments were applicable to this case, no relief would be warranted.

Under Louisiana law, a verdict will be set aside for jury misconduct if the moving party proves that the level of behavior was of such a grievous nature as to preclude the impartial administration of justice. *Uriegas v. Gainsco*, 663 So. 2d 162 (La. App. 3d Cir.), *writ denied*, 664 So. 2d 458 (1995).

Federal law imposes a similar, if not heavier, burden on the party seeking to set aside a verdict. In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), plaintiff sought a new trial on the basis that a juror had incorrectly stated that no family member had been seriously injured, when in fact the juror's son had sustained such an injury. The federal district court denied the motion for new trial and the Tenth Circuit reversed. In reversing the Tenth Circuit, this Court held that a party seeking to obtain a new trial in such a situation must first demonstrate that a juror failed to answer accurately a material question on *voir dire*, and then further show that a correct response would have provided a basis for a challenge for cause. *McDonough*, 464 U.S. at 556. This Court stressed that a party is not entitled to a perfect trial. *Id.* at 553. Similarly, in *Vezina v. Theriot Marine Service, Inc.*, 610 F.2d 251 (5th Cir. 1980) (cited by Petitioner), a juror's failure to reveal that a civil action *was currently pending against her* did not result in denial of right to fair trial.

In contrast, the only case that Petitioner cites which supports new trial based on a juror's inaccurate answer is *United States v. Scott*, 854 F.2d 697, 700 (5th Cir. 1988), which expressly applied a stricter standard to a criminal proceeding, granting a new trial where a juror deliberately failed to disclose that his brother was a sheriff who

had been involved in the investigation of the *very crime in question in the trial*, a fact that clearly would have supported a challenge for cause.

Here, the denial of Petitioner's motion for new trial did not result from any difference between Louisiana law and federal law as expressed in *McDonough*. Rather, Mr. Allement's inaccurate answer, absent other evidence, was neither "grievous" (the Louisiana standard), nor was it a basis of excusing a juror for cause (*McDonough, Vezina*). In an attempt to satisfy the cause requirement in the *McDonough* rule, Petitioner misstates Louisiana law. She asserts that *Lee v. K-Mart Corp.*, 483 So. 2d 609 (La. App. 3d Cir. 1985), *writ denied*, 484 So. 2d 661 (La. 1986), establishes that involvement in prior litigation establishes a basis for a challenge for cause. In fact, the basis for the challenge in *Lee* was not the prior litigation experience, but rather the juror's "responses [that] show he was biased and could not be impartial." 483 So. 2d at 611. Petitioner also confuses his *speculation* about Mr. Allement's attitude and motivation with the *facts* in the record. If Mr. Allement had answered accurately, Petitioner might have exercised a peremptory challenge, but that is irrelevant; *McDonough* expressly limits a new trial to situations that would support a challenge for cause.[1]

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[1] Petitioner asserts that an accurate answer by Mr. Allement would have led to a confession of bias, which would have supported a challenge for cause. But Petitioner elsewhere asserts that Mr. Allement deliberately provided a false answer because he wanted to stay on the jury so that he could act on a purported bias against plaintiffs. If Mr. Allement was indeed such a schemer, he certainly would not have made a concession of bias that would be necessary to support a challenge for cause.

Finally, even if the trial court's denial of new trial was held to be erroneous, the result here would not change. Under Louisiana law, where some legal error interdicts the jury verdict, the Court of Appeal must make its own independent review of the record and determine a preponderance of the evidence. *Temple v. Liberty Mutual Ins. Co.*, 330 So. 2d 891 (La. 1976). Judge Fogg of the Louisiana Court of Appeal, who dissented from the majority's opinion on the juror issue but concurred in the result, performed an independent review and concluded that Petitioner failed to prove the existence of any defect. There is no reason to believe that other judges of the Court of Appeal would conclude otherwise.

CONCLUSION

For these reasons, Respondent Ford Motor Company respectfully requests that Petitioner's petition for certiorari be denied.

Respectfully submitted,

MICHAEL J. O'REILLY
FORD MOTOR COMPANY
1500 Parklane Towers West
Dearborn, Michigan 48126
(313) 845-5263

ROBERT W. MAXWELL
JULIANNE T. ECHOLS
PULASKI, GIEGER & LABORDE
Suite 4800 – One Shell Square
New Orleans, Louisiana 70139
(504) 561-0400